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MEMORANDUM

(updated 5/21/13)

This memorandum lists the instructions the Tennessee Pattern Jury Instruction Committee (Criminal) changed or created after the 16th edition of the book was published in 2012. The Administrative Office of the Courts' website includes Word and WordPerfect "without comments and footnotes" versions of the instructions at issue. The "with comments and footnotes" versions of newly-created or substantially revised instructions 16.01, 16.02, 16.03 and 31.21 are attached to this memorandum.

1.00 – Preliminary Jury Instructions

- a. Immediately prior to the paragraph on p.6 which begins with "After you have heard all of the evidence," add a new paragraph IN BRACKETS with the following text: [Languages other than English may be used during this trial. The evidence that you are to consider is only that provided through the official court interpreter. Although some of you may know the language of the non-English language used, it is important that all jurors consider the same evidence. Therefore, you must base your decision on the evidence presented in the English interpretation. You must disregard any different meaning of the non-English words.]

2.06 – Burden of Proof: Venue (Computer Offenses)

- a. Delete the "and" at the end of section (b), delete the period at the end of section (c) and substitute a semi-colon followed by "and" and insert the following new section (d):
 - (d) [Only for computer offenses punishable as theft committed on or after 7/1/12:] in any county where one (1) or more elements of the offense occurred, or in the county where an act of solicitation, inducement, offer, acceptance, delivery, storage, or financial transaction occurred involving the property, service or article of the victim.
- b. Following this new section (d), insert a footnote with the following text: T.C.A. § 39-14-105(c).

5.01 – Violation of RICO Act

- a. On page 53 delete the definition of “Racketeering activity” and substitute the language below. ALSO, move footnote 16 from its existing position to the end of the new language below.

[For offenses committed prior to 7/1/12: “Racketeering activity” means to commit, to attempt to commit, to conspire to commit, or to solicit, coerce, or intimidate another person to commit an act for financial gain which is a criminal offense as alleged in Count(s) _____ of the indictment.]

or

[For offenses committed on or after 7/1/12: “Racketeering activity” means [to commit, to attempt to commit, to conspire to commit, or to solicit, coerce, or intimidate another person to commit an act for financial gain that is a criminal offense involving *[controlled substances, and the amount of controlled substances involved in the offense is included under § 39-17-417(i) and (j) and its subdivisions]* *[aggravated sexual exploitation of a minor or especially aggravated sexual exploitation of a minor under §§ 39-17-1004(b)(1)(A) and 39-17-1005(a)(1)]* *[to commit, attempt to commit, conspire to commit, or to solicit, coerce, or intimidate another person to commit a criminal gang offense, as defined in § 40-35-121(a).]* (INSERT FOOTNOTE 16 HERE)]

- b. In element (1) of Part A, Part B, Part C, Part D-1, Part D-2, and Part D-3, delete the words “is a person who”

6.01 – Assault

- a. Add the following as a new comment: Tenn. Pub. Acts ch. 1006, §§ 2 & 4, effective 7/1/12, exempts from criminal liability “any act or omission by a pregnant woman with respect to an embryo or fetus with which she is pregnant.” See T.C.A. § 39-13-107(c) and -214(c). These statutes explicitly prohibit a criminal action against a woman for narcotic drug use that results in her newborn’s drug addiction or birth defects. See Tenn. Att’y Gen. Op. 13-01 (February 1, 2013), abrogating Tenn. Att’y Gen. Op. 08-114 (May 21, 2008).
- b. In footnote 8, insert “be” between “fetus” and “viable”

6.02 – Aggravated Assault

- a. Add the following as a new comment: Tenn. Pub. Acts ch. 1006, §§ 2 & 4, effective 7/1/12, exempts from criminal liability “any act or omission by a pregnant woman with respect to an embryo or fetus with which she is pregnant.” See T.C.A. § 39-13-107(c) and -214(c). These statutes explicitly prohibit a criminal action against a woman for narcotic drug use that results in her newborn’s drug addiction or birth defects. See Tenn. Att’y Gen. Op. 13-01 (February 1, 2013), abrogating Tenn. Att’y Gen. Op. 08-114 (May 21, 2008).

6.03 – Reckless Endangerment

- a. Add the following as a new comment: Tenn. Pub. Acts ch. 1006, §§ 2 & 4, effective 7/1/12, exempts from criminal liability “any act or omission by a pregnant woman with respect to an embryo or fetus with which she is pregnant.” See T.C.A. § 39-13-107(c) and -214(c). These statutes explicitly prohibit a criminal action against a woman for narcotic drug use that results in

her newborn's drug addiction or birth defects. See Tenn. Att'y Gen. Op. 13-01 (February 1, 2013), abrogating Tenn. Att'y Gen. Op. 08-114 (May 21, 2008).

6.04 – Vehicular Assault

- a. Add the following as a new comment: Tenn. Pub. Acts ch. 1006, §§ 2 & 4, effective 7/1/12, exempts from criminal liability “any act or omission by a pregnant woman with respect to an embryo or fetus with which she is pregnant.” See T.C.A. § 39-13-107(c) and -214(c). These statutes explicitly prohibit a criminal action against a woman for narcotic drug use that results in her newborn's drug addiction or birth defects. See Tenn. Att'y Gen. Op. 13-01 (February 1, 2013), abrogating Tenn. Att'y Gen. Op. 08-114 (May 21, 2008).

6.06 – Criminal Exposure to [HIV] [HBV] [HCV]

- a. Add the following as a new Comment 4: Tenn. Pub. Acts ch. 1006, §§ 2 & 4, effective 7/1/12, exempts from criminal liability “any act or omission by a pregnant woman with respect to an embryo or fetus with which she is pregnant.” See T.C.A. § 39-13-107(c) and -214(c). These statutes explicitly prohibit a criminal action against a woman for narcotic drug use that results in her newborn's drug addiction or birth defects. See Tenn. Att'y Gen. Op. 13-01 (February 1, 2013), abrogating Tenn. Att'y Gen. Op. 08-114 (May 21, 2008).
- b. Following the semi-colon at the end of element (2)(b) on page 78, insert a footnote with the following text: See Comment 5.
- c. Create a new Comment 5 that provides as follows: Proof beyond a reasonable doubt that the transfer, donation or providing of blood, tissue, semen, organs or other bodily fluids or parts “presents a significant risk” of transmission may require expert testimony. See *State v. Ronnie Ingram*, W2011-02595-CCA-R3-CD, 2012 Tenn. Crim. App. LEXIS 887, 13-14 (Tenn. Crim. App. Oct. 31, 2012).

6.08(a) – Domestic Assault (on or after 4/10/08)

- a. Add the following as a new comment: Tenn. Pub. Acts ch. 1006, §§ 2 & 4, effective 7/1/12, exempts from criminal liability “any act or omission by a pregnant woman with respect to an embryo or fetus with which she is pregnant.” See T.C.A. § 39-13-107(c) and -214(c). These statutes explicitly prohibit a criminal action against a woman for narcotic drug use that results in her newborn's drug addiction or birth defects. See Tenn. Att'y Gen. Op. 13-01 (February 1, 2013), abrogating Tenn. Att'y Gen. Op. 08-114 (May 21, 2008).

7.01 – First Degree Murder – premeditated (on or after 7/1/95)

- a. Add the following as a new comment: Tenn. Pub. Acts ch. 1006, §§ 2 & 4, effective 7/1/12, exempts from criminal liability “any act or omission by a pregnant woman with respect to an embryo or fetus with which she is pregnant.” See T.C.A. § 39-13-107(c) and -214(c). These statutes explicitly prohibit a criminal action against a woman for narcotic drug use that results in her newborn's drug addiction or birth defects. See Tenn. Att'y Gen. Op. 13-01 (February 1, 2013), abrogating Tenn. Att'y Gen. Op. 08-114 (May 21, 2008).

7.02 – First Degree Murder – destructive device or bomb (on or after 7/1/95)

- a. Add the following as a new comment: Tenn. Pub. Acts ch. 1006, §§ 2 & 4, effective 7/1/12, exempts from criminal liability “any act or omission by a pregnant woman with respect to an embryo or fetus with which she is pregnant.” See T.C.A. § 39-13-107(c) and -214(c). These statutes explicitly prohibit a criminal action against a woman for narcotic drug use that results in her newborn’s drug addiction or birth defects. See Tenn. Att’y Gen. Op. 13-01 (February 1, 2013), abrogating Tenn. Att’y Gen. Op. 08-114 (May 21, 2008).

7.03 – First Degree Murder – felony murder (on or after 7/1/95)

- a. Add the following as a new comment: Tenn. Pub. Acts ch. 1006, §§ 2 & 4, effective 7/1/12, exempts from criminal liability “any act or omission by a pregnant woman with respect to an embryo or fetus with which she is pregnant.” See T.C.A. § 39-13-107(c) and -214(c). These statutes explicitly prohibit a criminal action against a woman for narcotic drug use that results in her newborn’s drug addiction or birth defects. See Tenn. Att’y Gen. Op. 13-01 (February 1, 2013), abrogating Tenn. Att’y Gen. Op. 08-114 (May 21, 2008).

7.05(a) – Second Degree Murder (knowing killing)

- a. Add the following as a new comment: Tenn. Pub. Acts ch. 1006, §§ 2 & 4, effective 7/1/12, exempts from criminal liability “any act or omission by a pregnant woman with respect to an embryo or fetus with which she is pregnant.” See T.C.A. § 39-13-107(c) and -214(c). These statutes explicitly prohibit a criminal action against a woman for narcotic drug use that results in her newborn’s drug addiction or birth defects. See Tenn. Att’y Gen. Op. 13-01 (February 1, 2013), abrogating Tenn. Att’y Gen. Op. 08-114 (May 21, 2008).

7.05(b) – Second Degree Murder (drugs as proximate cause)

- a. Add the following as a new comment: Tenn. Pub. Acts ch. 1006, §§ 2 & 4, effective 7/1/12, exempts from criminal liability “any act or omission by a pregnant woman with respect to an embryo or fetus with which she is pregnant.” See T.C.A. § 39-13-107(c) and -214(c). These statutes explicitly prohibit a criminal action against a woman for narcotic drug use that results in her newborn’s drug addiction or birth defects. See Tenn. Att’y Gen. Op. 13-01 (February 1, 2013), abrogating Tenn. Att’y Gen. Op. 08-114 (May 21, 2008).

7.06 – Voluntary Manslaughter

- a. Add the following as a new comment: Tenn. Pub. Acts ch. 1006, §§ 2 & 4, effective 7/1/12, exempts from criminal liability “any act or omission by a pregnant woman with respect to an embryo or fetus with which she is pregnant.” See T.C.A. § 39-13-107(c) and -214(c). These statutes explicitly prohibit a criminal action against a woman for narcotic drug use that results in her newborn’s drug addiction or birth defects. See Tenn. Att’y Gen. Op. 13-01 (February 1, 2013), abrogating Tenn. Att’y Gen. Op. 08-114 (May 21, 2008).

7.07 – Criminally Negligent Homicide

- a. Add the following as a new comment: Tenn. Pub. Acts ch. 1006, §§ 2 & 4, effective 7/1/12, exempts from criminal liability “any act or omission by a pregnant woman with respect to an embryo or fetus with which she is pregnant.” See T.C.A. § 39-13-107(c) and -214(c). These statutes explicitly prohibit a criminal action against a woman for narcotic drug use that results in

her newborn's drug addiction or birth defects. See Tenn. Att'y Gen. Op. 13-01 (February 1, 2013), abrogating Tenn. Att'y Gen. Op. 08-114 (May 21, 2008).

7.08(a) – Vehicular Homicide (reckless conduct)

- a. Add the following as a new comment: Tenn. Pub. Acts ch. 1006, §§ 2 & 4, effective 7/1/12, exempts from criminal liability “any act or omission by a pregnant woman with respect to an embryo or fetus with which she is pregnant.” See T.C.A. § 39-13-107(c) and -214(c). These statutes explicitly prohibit a criminal action against a woman for narcotic drug use that results in her newborn's drug addiction or birth defects. See Tenn. Att'y Gen. Op. 13-01 (February 1, 2013), abrogating Tenn. Att'y Gen. Op. 08-114 (May 21, 2008).

7.08(b) – Vehicular Homicide (intoxication)

- a. Add the following as a new comment: Tenn. Pub. Acts ch. 1006, §§ 2 & 4, effective 7/1/12, exempts from criminal liability “any act or omission by a pregnant woman with respect to an embryo or fetus with which she is pregnant.” See T.C.A. § 39-13-107(c) and -214(c). These statutes explicitly prohibit a criminal action against a woman for narcotic drug use that results in her newborn's drug addiction or birth defects. See Tenn. Att'y Gen. Op. 13-01 (February 1, 2013), abrogating Tenn. Att'y Gen. Op. 08-114 (May 21, 2008).

7.08(c) – Vehicular Homicide (.08% alcohol concentration)

- a. Add the following as a new comment: Tenn. Pub. Acts ch. 1006, §§ 2 & 4, effective 7/1/12, exempts from criminal liability “any act or omission by a pregnant woman with respect to an embryo or fetus with which she is pregnant.” See T.C.A. § 39-13-107(c) and -214(c). These statutes explicitly prohibit a criminal action against a woman for narcotic drug use that results in her newborn's drug addiction or birth defects. See Tenn. Att'y Gen. Op. 13-01 (February 1, 2013), abrogating Tenn. Att'y Gen. Op. 08-114 (May 21, 2008).

7.08(d) – Vehicular Homicide (drag racing)

- a. Add the following as a new comment: Tenn. Pub. Acts ch. 1006, §§ 2 & 4, effective 7/1/12, exempts from criminal liability “any act or omission by a pregnant woman with respect to an embryo or fetus with which she is pregnant.” See T.C.A. § 39-13-107(c) and -214(c). These statutes explicitly prohibit a criminal action against a woman for narcotic drug use that results in her newborn's drug addiction or birth defects. See Tenn. Att'y Gen. Op. 13-01 (February 1, 2013), abrogating Tenn. Att'y Gen. Op. 08-114 (May 21, 2008).

7.08(e) – Vehicular Homicide (construction zone)

- a. Add the following as a new comment: Tenn. Pub. Acts ch. 1006, §§ 2 & 4, effective 7/1/12, exempts from criminal liability “any act or omission by a pregnant woman with respect to an embryo or fetus with which she is pregnant.” See T.C.A. § 39-13-107(c) and -214(c). These statutes explicitly prohibit a criminal action against a woman for narcotic drug use that results in her newborn's drug addiction or birth defects. See Tenn. Att'y Gen. Op. 13-01 (February 1, 2013), abrogating Tenn. Att'y Gen. Op. 08-114 (May 21, 2008).

7.09 – Reckless Homicide

- a. Add the following as a new comment: Tenn. Pub. Acts ch. 1006, §§ 2 & 4, effective 7/1/12, exempts from criminal liability “any act or omission by a pregnant woman with respect to an embryo or fetus with which she is pregnant.” See T.C.A. § 39-13-107(c) and -214(c). These statutes explicitly prohibit a criminal action against a woman for narcotic drug use that results in her newborn’s drug addiction or birth defects. See Tenn. Att’y Gen. Op. 13-01 (February 1, 2013), abrogating Tenn. Att’y Gen. Op. 08-114 (May 21, 2008).

8.01 – Kidnapping

- a. In the last line of the paragraph which begins with “Unless you find beyond a reasonable doubt” on page 174, delete “[especially] [aggravated] [kidnapping] [false imprisonment]” and substitute “kidnapping” without brackets.

8.02 – Aggravated Kidnapping

- a. In the second line of the paragraph which begins with “only include if another offense was committed” on page 178, delete “kidnapping” and substitute “aggravated kidnapping”
- b. In the last line of the paragraph which begins with “Unless you find beyond a reasonable doubt” on page 179, delete “[especially] [aggravated] [kidnapping] [false imprisonment]” and substitute “aggravated kidnapping” without brackets.

8.03 – Especially Aggravated Kidnapping

- a. In the second line of the paragraph which begins with “only include if another offense was committed” on page 183, delete “kidnapping” and substitute “especially aggravated kidnapping”
- b. In the last line of the paragraph which begins with “Unless you find beyond a reasonable doubt” on page 184, delete “[especially] [aggravated] [kidnapping] [false imprisonment]” and substitute “especially aggravated kidnapping” without brackets.

8.05 – False Imprisonment

- a. In the second line of the paragraph which begins with “only include if another offense was committed” on page 193, delete “kidnapping” and substitute “false imprisonment”
- b. In the last line of the paragraph which begins with “Unless you find beyond a reasonable doubt” on page 194, delete “[especially] [aggravated] [kidnapping] [false imprisonment]” and substitute “false imprisonment” without brackets.

9.02 – Aggravated Robbery

- a. Delete the text of element (4) on p. 215 and substitute the following text (the bracketed language will be italicized): that the defendant took such property from the person of another by *[the use of violence]* *[putting the person in fear]* *[the use of violence or by putting the person in fear]*
- b. Between the word “fear” and the closing bracket in the third set of bracketed language, insert a footnote which has the following text: Unless both fear and violence are mentioned in the indictment, this third bracket should not be used as “the accused cannot be tried for or convicted

of an offense not charged in the indictment or information.” *State v. Goodson*, 77 S.W.3d 240, 244 (Tenn. Crim. App. 2001).

- c. On p. 216, put brackets around the paragraph which begins with “The fear constituting”
- d. On p. 219, put brackets around the definition of violence. Since there is already a bracket at the end of that paragraph, there will now be two brackets.

11.03(a) – Fixing Value

- a. On p. 392, add a new **bracketed** section (F), which will have the following text: If the animal killed was a police dog, fire dog, search and rescue dog, service animal or police horse, the jury shall consider the value of the police dog, fire dog, search and rescue dog, service animal or police horse as both the cost of the animal and any specialized training the animal received.
- b. Following this new language, add a footnote which has the following text: T.C.A. § 39-14-205(a)(2).
- c. On p. 392, add a new **bracketed** section (G), which will have the following text: In determining the value of the property vandalized, the value of the property shall be fixed at the amount of the damage, the reasonable cost of repairing the damage to the property, or the cost of replacement of the property vandalized.
- d. Following this new language, insert a footnote which has the following text: See T.P.I. CIVIL – 14.45.
- e. On p. 392, add a new **bracketed** section (H), which will have the following text: In determining the value of the destruction or interference, the value of the destruction shall be fixed at the amount of the damage or the cost of replacement of the property. The value of the interference shall be fixed at the amount of the interference to the railroad.
- f. Following this new language, insert a footnote which has the following text: T.C.A. § 39-14-114(b).
- g. On p. 392, add a new **bracketed** section (I), which will have the following text: [For a violation of 16.01 and 16.03 and a violation of some provisions in 16.02 only] Value includes *[the face value of the creation of or amount of alteration to any financial instrument or of an electronic transfer of funds] [the cost of any alteration, damage, destruction or disruption to any computer, computer system, computer network, computer software, program, or data] [the market value of any unauthorized copy, in any form, including, but not limited to, any printed or electronic form of computer data, computer programs, or computer software residing in, communicated by, or produced by a computer or computer network] [the amount of any proceeds received, concealed or used]*.
- h. Following this new language, insert a footnote which has the following text: T.C.A. § 39-14-602(a)-(c).
- i. In the third line of the first paragraph, on p. 391, insert “[money]” after “[property] [services]” and prior to the period. Italicize this new language. The existing language is already italicized.

12.02 – Intentional Killing of Animal

- a. Delete the last paragraph of this instruction (pp. 503-04) and substitute the following bracketed text: [The trial judge should now instruct the jury with respect to fixing the value of the animal killed utilizing T.P.I. – Crim. 11.03(a), Fixing Value, using both sections (A) and (F), if applicable.]
- b. Add a new comment with the following text: Venue in a prosecution for this offense shall be in the county where one (1) or more elements of the offense occurred, or in the county where an act of solicitation, inducement, offer, acceptance, delivery, storage, or financial transaction occurred involving the animal.

14.04 – Vandalism

- a. Delete the last paragraph of this instruction (p. 561) and substitute the following bracketed text: [The trial judge should now instruct the jury with respect to fixing the value of the property damaged or destroyed utilizing T.P.I. – Crim. 11.03(a), Fixing Value, using both sections (A) and (G), if applicable.]

14.11 – Destruction or Interference with Property Utilized by Railroads

- a. Delete the last paragraph of the instruction on p. 581 and substitute the following text: [If the offense on trial does not involve imminent danger of death or serious bodily injury, the trial judge should now instruct the jury with respect to fixing the value of the destruction or interference utilizing T.P.I. -- CRIM. 11.03(a), Fixing Value, using both sections (A) and (H), if applicable.]
- b. Insert the following text at the end of the second paragraph of Comment One: If it is punished as theft, venue in a prosecution for this offense shall be in the county where one (1) or more elements of the offense occurred, or in the county where an act of solicitation, inducement, offer, acceptance, delivery, storage, or financial transaction occurred involving the property.
- c. In the second line of the second paragraph of Comment One, delete “death of serious bodily injury” and substitute “death or serious bodily injury.”

16.01 – Accessing Computer to Obtain by False Pretenses

- a. Change the name of this instruction to “Computer Fraud”
- b. In the body of the instruction, substitute the new language for the existing language. There are numerous changes, so a new “with comments and footnotes” version has been drafted.

16.02 – Accessing, Altering or Contaminating Computer or Computer Security Device Without Authorization

- a. Change the name of this instruction to “Computer Tampering”
- b. In the body of the instruction, substitute the new language for the existing language. There are numerous changes, so a new “with comments and footnotes” version has been drafted.

16.03 – Receiving, Concealing, Using or Aiding Another in Receiving, Concealing or Using Proceeds from Computer Crimes

- a. Change the name of this instruction to “Receiving, Concealing Or Using Proceeds Resulting From Computer [Fraud] [Tampering]”
- b. In the body of the instruction, substitute the new language for the existing language. There are numerous changes, so a new “with comments and footnotes” version has been drafted.

21.01(a) – Agg Child Abuse and Neglect (prior to 7/1/05)

- a. Immediately after the word “defendant” in the first line of element (1) on page 645, add a footnote that states: If the trial judge is considering trying two or more defendants at the same time, see Comment 5.
- b. Create a new Comment 5. The new comment will have the following text:

If the trial judge is considering trying two or more defendants for this offense at the same time, the judge should become familiar with the issues raised in *State v. Gomez*, 367 S.W.3d 237 (Tenn. 2012) and the perils encountered when one defendant attempts to garner character proof from another co-defendant, whose credibility is then impeached by knowledge of prior bad acts of the defendant. The Court "underscores the difficulty in pursuing joint trials for co-defendants who are charged with abuse of a child. Although we decline to require the severance of the trials of defendants in [child abuse/neglect/endangerment] cases, trial courts should give motions to sever serious consideration when such motions are made." *Id.* at 246 n. 7.

The Court also held that "when a trial court permits cross-examination of a [co-defendant] character witness concerning specific instances of a defendant's conduct, the trial court must provide an instruction limiting consideration of the evidence for the purpose of evaluating the character witness's credibility. *State v. Nesbit*, 978 S.W.2d 872, 883 (Tenn. 1998)." *Gomez* at 247. To that end, the trial judge may wish to utilize a modified form of T.P.I. -- Crim. 42.10, Evidence of other crimes.

21.01(b) – Agg Child [Abuse] [Neglect or Endangerment] (on or after 7/1/05 but prior to 7/1/09)

- a. Immediately after the word “defendant” in the first line of element (1) of Part A **AND** Part B on pages 648 and 649, add a footnote that states: If the trial judge is considering trying two or more defendants at the same time, see Comment 4.
- b. Create a new Comment 4. The new comment will have the following text:

If the trial judge is considering trying two or more defendants for this offense at the same time, the judge should become familiar with the issues raised in *State v. Gomez*, 367 S.W.3d 237 (Tenn. 2012) and the perils encountered when one defendant attempts to garner character proof from another co-defendant, whose credibility is then impeached by knowledge of prior bad acts of the defendant. The Court "underscores the difficulty in pursuing joint trials for co-defendants who are charged with abuse of a child. Although we decline to require the severance of the trials of defendants in [child abuse/neglect/endangerment] cases, trial courts should give motions to sever serious consideration when such motions are made." *Id.* at 246 n. 7.

The Court also held that "when a trial court permits cross-examination of a [co-defendant] character witness concerning specific instances of a defendant's conduct, the trial court must provide an instruction limiting consideration of the evidence for the purpose of evaluating the character witness's credibility. *State v. Nesbit*, 978 S.W.2d 872, 883 (Tenn. 1998)." *Gomez* at 247. To that end, the trial judge may wish to utilize a modified form of T.P.I. -- Crim. 42.10, Evidence of other crimes.

21.01(c) – Agg Child [Abuse] [Neglect] (on or after 7/1/09)

- a. Immediately after the word "defendant" in the first line of element (1) in Part A **AND** Part B on pages 653 and 654, add a footnote that states: If the trial judge is considering trying two or more defendants at the same time, see Comment 3.
- b. Create a new Comment 3. The new comment will have the following text:

If the trial judge is considering trying two or more defendants for this offense at the same time, the judge should become familiar with the issues raised in *State v. Gomez*, 367 S.W.3d 237 (Tenn. 2012) and the perils encountered when one defendant attempts to garner character proof from another co-defendant, whose credibility is then impeached by knowledge of prior bad acts of the defendant. The Court "underscores the difficulty in pursuing joint trials for co-defendants who are charged with abuse of a child. Although we decline to require the severance of the trials of defendants in [child abuse/neglect/endangerment] cases, trial courts should give motions to sever serious consideration when such motions are made." *Id.* at 246 n. 7.

The Court also held that "when a trial court permits cross-examination of a [co-defendant] character witness concerning specific instances of a defendant's conduct, the trial court must provide an instruction limiting consideration of the evidence for the purpose of evaluating the character witness's credibility. *State v. Nesbit*, 978 S.W.2d 872, 883 (Tenn. 1998)." *Gomez* at 247. To that end, the trial judge may wish to utilize a modified form of T.P.I. -- Crim. 42.10, Evidence of other crimes.

21.02(a) – Child Abuse and Neglect (prior to 7/1/05)

- a. Immediately after the word "defendant" in the first line of element (1) on page 659, add a footnote that states: If the trial judge is considering trying two or more defendants at the same time, see Comment 6.
- b. Create a new Comment 6. The new comment will have the following text:

If the trial judge is considering trying two or more defendants for this offense at the same time, the judge should become familiar with the issues raised in *State v. Gomez*, 367 S.W.3d 237 (Tenn. 2012) and the perils encountered when one defendant attempts to garner character proof from another co-defendant, whose credibility is then impeached by knowledge of prior bad acts of the defendant. The Court "underscores the difficulty in pursuing joint trials for co-defendants who are charged with abuse of a child. Although we decline to require the severance of the trials of defendants in [child abuse/neglect/endangerment] cases, trial courts should give motions to sever serious consideration when such motions are made." *Id.* at 246 n. 7.

The Court also held that "when a trial court permits cross-examination of a [co-defendant] character witness concerning specific instances of a defendant's conduct, the trial court must provide an instruction limiting consideration of the evidence for the purpose of evaluating the

character witness's credibility. *State v. Nesbit*, 978 S.W.2d 872, 883 (Tenn. 1998)." *Gomez* at 247. To that end, the trial judge may wish to utilize a modified form of T.P.I. -- Crim. 42.10, Evidence of other crimes.

21.02(b) – Child [Abuse] [Neglect] (on or after 7/1/05)

- a. Immediately after the word “defendant” in the first line of element (1) in Part A **AND** Part B on page 662, add a footnote that states: If the trial judge is considering trying two or more defendants at the same time, see Comment 6.
- b. Create a new Comment 6. The new comment will have the following text:

If the trial judge is considering trying two or more defendants for this offense at the same time, the judge should become familiar with the issues raised in *State v. Gomez*, 367 S.W.3d 237 (Tenn. 2012) and the perils encountered when one defendant attempts to garner character proof from another co-defendant, whose credibility is then impeached by knowledge of prior bad acts of the defendant. The Court "underscores the difficulty in pursuing joint trials for co-defendants who are charged with abuse of a child. Although we decline to require the severance of the trials of defendants in [child abuse/neglect/endangerment] cases, trial courts should give motions to sever serious consideration when such motions are made." *Id.* at 246 n. 7.

The Court also held that "when a trial court permits cross-examination of a [co-defendant] character witness concerning specific instances of a defendant's conduct, the trial court must provide an instruction limiting consideration of the evidence for the purpose of evaluating the character witness's credibility. *State v. Nesbit*, 978 S.W.2d 872, 883 (Tenn. 1998)." *Gomez* at 247. To that end, the trial judge may wish to utilize a modified form of T.P.I. -- Crim. 42.10, Evidence of other crimes.

21.03(a) – Parental or Custodial Child Endangerment

- a. Immediately after the word “defendant” in the first line of element (1) on page 666, add a footnote that states: If the trial judge is considering trying two or more defendants at the same time, see Comment 3.
- b. Create a new Comment 3. The new comment will have the following text:

If the trial judge is considering trying two or more defendants for this offense at the same time, the judge should become familiar with the issues raised in *State v. Gomez*, 367 S.W.3d 237 (Tenn. 2012) and the perils encountered when one defendant attempts to garner character proof from another co-defendant, whose credibility is then impeached by knowledge of prior bad acts of the defendant. The Court "underscores the difficulty in pursuing joint trials for co-defendants who are charged with abuse of a child. Although we decline to require the severance of the trials of defendants in [child abuse/neglect/endangerment] cases, trial courts should give motions to sever serious consideration when such motions are made." *Id.* at 246 n. 7.

The Court also held that "when a trial court permits cross-examination of a [co-defendant] character witness concerning specific instances of a defendant's conduct, the trial court must provide an instruction limiting consideration of the evidence for the purpose of evaluating the character witness's credibility. *State v. Nesbit*, 978 S.W.2d 872, 883 (Tenn. 1998)." *Gomez* at 247. To that end, the trial judge may wish to utilize a modified form of T.P.I. -- Crim. 42.10, Evidence of other crimes.

21.03(b) – Aggravated Parental or Custodial Child Endangerment

- a. Immediately after the word “defendant” in the first line of element (1) on page 668, add a footnote that states: If the trial judge is considering trying two or more defendants at the same time, see Comment 2.
- b. Create a new Comment 2. The new comment will have the following text:

If the trial judge is considering trying two or more defendants for this offense at the same time, the judge should become familiar with the issues raised in *State v. Gomez*, 367 S.W.3d 237 (Tenn. 2012) and the perils encountered when one defendant attempts to garner character proof from another co-defendant, whose credibility is then impeached by knowledge of prior bad acts of the defendant. The Court “underscores the difficulty in pursuing joint trials for co-defendants who are charged with abuse of a child. Although we decline to require the severance of the trials of defendants in [child abuse/neglect/endangerment] cases, trial courts should give motions to sever serious consideration when such motions are made.” *Id.* at 246 n. 7.

The Court also held that “when a trial court permits cross-examination of a [co-defendant] character witness concerning specific instances of a defendant’s conduct, the trial court must provide an instruction limiting consideration of the evidence for the purpose of evaluating the character witness’s credibility. *State v. Nesbit*, 978 S.W.2d 872, 883 (Tenn. 1998).” *Gomez* at 247. To that end, the trial judge may wish to utilize a modified form of T.P.I. -- Crim. 42.10, Evidence of other crimes.

30.12(a) – Stalking (on or after 7/1/05)

- a. Add the following after element (2):

[For offenses committed on or after 5/21/12: and

- (3) that the defendant, at the time of the offense, was required to or was registered with the Tennessee Bureau of Investigation as a sexual offender, violent sexual offender or violent juvenile sexual offender, as defined in § 40-39-202.]
- b. Add a footnote after the closing bracket of this new text. The text of the footnote will be as follows: See Comment 2.
- c. Insert a new Comment 2 with the following text: If the indictment charges this element and the trial judge finds that proof of this element may violate Tenn. R. Evid. 404(b), the trial judge may wish to bifurcate this part of the trial and charge this element in a supplemental instruction patterned after an amended version of T.P.I. – Crim. 31.05(a) after the second phase of the trial.
- d. Add the following text to the end of Comment One: For offenses committed on or after 5/21/12, stalking is a Class E felony if the defendant, at the time of the offense, was required to or was registered with the Tennessee Bureau of Investigation as a sexual offender, violent sexual offender or violent juvenile sexual offender. T.C.A. § 39-17-315(b)(3).

31.03 – Unlawful Drug Paraphernalia Uses and Activities

- a. In the definition section on p. 924, add the following language to the end of the definition for “Drug paraphernalia.” Footnote 7 should be moved to the end of this new language AND the text

of footnote 7 should be changed to “T.C.A. § 39-17-402(12).” The new language which is being added to the drug paraphernalia definition is as follows:

“Drug paraphernalia” includes, but is not limited to:

- (A) Isomerization devices used, intended for use, or designed for use in increasing the potency of any species of plant that is a controlled substance;
- (B) Testing equipment used, intended for use, or designed for use in identifying, or in analyzing the strength, effectiveness or purity of controlled substances; and
- (C) Objects used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, or hashish oil into the human body, such as:
 - (i) Metal, acrylic, glass, stone, or plastic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;
 - (ii) Water pipes;
 - (iii) Carburetion tubes and devices;
 - (iv) Smoking and carburetion masks;
 - (v) Chamber pipes;
 - (vi) Carburetor pipes;
 - (vii) Electric pipes;
 - (viii) Chillums;
 - (ix) Bongs; and
 - (x) Ice pipes or chillers.

- b. In a new paragraph immediately following this expanded definition of “drug paraphernalia” add the following text:

In determining whether a particular object is drug paraphernalia as defined above, the jury shall, in addition to all other logically relevant factors, consider the following:

- (1) Statements by the owner or anyone in control of the object concerning its use;
- [(2) Prior convictions, if any, of the owner or of anyone in control of the object for violation of any state or federal law relating to controlled substances or controlled substance analogues;]
- (3) The existence of any residue of controlled substances or controlled substance analogues on the object;
- (4) Instructions, oral or written, provided with the object concerning its use;
- (5) Descriptive materials accompanying the object that explain or depict its use;
- (6) The manner in which the object is displayed for sale;
- (7) The existence and scope of legitimate uses for the object in the community; and
- (8) Expert testimony concerning its use.

- c. Immediately following the closing bracket after element (2) of this new section, add a footnote with the following text: T.C.A. § 39-17-424. The trial judge may wish to remove factor (2) if not applicable, renumbering the remaining factors accordingly, or have a Tenn. R. Evid. 404(b) hearing prior to charging factor (2) and allowing introduction of prior convictions of the defendant.

31.05 – Simple Possession

- a. Add the following new paragraph as the final paragraph of this instruction following the definition of “intentionally”: [It is an exception to this offense that the controlled substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of professional practice. (INSERT A FOOTNOTE) If the defendant proves this

exception by a preponderance of the evidence,(INSERT FOOTNOTE) you must find [him] [her] not guilty.]

- b. The first footnote in this new paragraph will have the following text: T.C.A. § 39-17-418(a)
- c. The second footnote in this new paragraph will have the following text: T.C.A. § 39-11-202(b)(2). The trial judge should utilize T.P.I. – CRIM. 42.01, Preponderance of Evidence.

31.20 – Controlled Substance Analogue

- a. On p. 977, add brackets around option “(C)” near the top of the page. Immediately following the closing bracket, which should appear between the semi-colon and the word “and” add a footnote with the following text: T.C.A. § 39-17-424. The trial judge may wish to remove factor (2) if not applicable, renumbering the following factors accordingly, or have a Tenn. R. Evid. 404(b) hearing prior to charging factor (2) and allowing introduction of prior convictions of the defendant.
- b. In the first paragraph of this instruction, add the following (in italics) after “[casually exchanged]”: *[represented] [advertised] [inferred]*

31.21 – Controlled Substance Analogues: Unlawful Representation, Advertisement or Inference

- a. New instruction.

40.04 – Defense: Entrapment

- a. Add the following language as a new comment:

State v. Blackmon, 78 S.W.3d 322, 331 (Tenn. Crim. App. 2001), provides as follows with regard to the circumstances in which the trial court must instruct on entrapment:

The threshold question of whether the defense of entrapment has been “fairly raised” is for determination by the judge and not the jury. Nonetheless, where the proof fairly raises the issue of entrapment, and the proof is supported by credible evidence, the trial court is required to give the instruction of entrapment whether requested or not. To determine when this statutory defense is fairly raised by the proof so as to require its submission to the jury, a court must, in effect, consider the evidence in the light most favorable to the defendant, including all reasonable inferences flowing from that evidence. *See State v. Bult*, 989 S.W.2d 730, 733 (Tenn. Crim. App. 1998), *perm. to appeal denied*, (Tenn. 1999) (*citing State v. Shropshire*, 874 S.W.2d 634, 639 (Tenn. Crim. App. 1993)). Thus, if entrapment is, in fact, “fairly raised by the proof,” the issue of predisposition becomes a question of fact for the jury. *See also Sherman v. United States*, 356 U.S. at 377, 78 S.Ct. 819.

42.04 – Credibility of Witness: In General and When Defendant Testifying

- a. In the second line of the last paragraph on p. 1319, delete “intrepreter” and substitute “interpreter”

42.04(a) – Alternative Instruction: Credibility of Witness

- a. In the second line of the last paragraph on p.1322, delete “intrepreter” and substitute “interpreter”

42.04(b) – Alternative Instruction: Witness

- a. In the second line of last paragraph prior to the comments on p.1324, delete “intrepreter” and substitute “interpreter”

T.P.I. -- CRIM. 16.01

COMPUTER FRAUD

Any person who commits computer fraud is guilty of a crime.

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:¹

[Part A:

- (1) that the defendant, directly or indirectly, *[accessed]* *[caused to be accessed]* *[attempted to access]* any *[telephone system]* *[telecommunications facility]* *[computer software]* *[computer program]* *[data]* *[computer]* *[computer system]* *[computer network]* or any part thereof;

and

- (2) that the access was for the purpose of obtaining *[money]* *[property]* *[services]* for the defendant or another by means of false or fraudulent *[pretenses]* *[representations]* *[promises]*;

and

- (3) that the defendant acted knowingly.

[and

- (4) that the offense was committed in connection with an act of terrorism.]²

or

[Part B:

- (1) that the defendant, directly or indirectly, *[accessed]* *[caused to be accessed]* *[attempted to access]* any *[telephone system]* *[telecommunications facility]*

[computer software] [computer program] [data] [computer] [computer system]
[computer network] or any part thereof;

and

- (2) that the access was for the purpose of causing computer output to be purposely false for, but not limited to, the purpose of obtaining *[money]* *[property]* *[services]* for the defendant or another by means of false or fraudulent *[pretenses]* *[representations]* *[promises]*;

and

- (3) that the defendant acted knowingly.

[and

- (4) that the offense was committed in connection with an act of terrorism.]³

or

[PART C:

- (1) that the defendant, directly or indirectly, *[accessed]* *[caused to be accessed]* *[attempted to access]* any *[telephone system]* *[telecommunications facility]* *[computer software]* *[computer program]* *[data]* *[computer]* *[computer system]* *[computer network]* or any part thereof;

and

- (2) that the access was for the purpose of effecting the creation or alteration of *[a financial instrument]* *[an electronic transfer of funds]* with the intent to disrupt, alter, misappropriate, or commit fraud;

and

- (3) that the defendant acted knowingly.

[and

(4) that the offense was committed in connection with an act of terrorism.]]^{4]}

"Access" means to approach, instruct, communicate, or connect with, store data in, retrieve or intercept data from, or otherwise make use of any resources of a computer, computer system, or computer network, or information exchanged from any communication between computers or authorized computer users and electronic, electromagnetic, electrochemical, acoustic, mechanical, or other means.⁵

"Authorization" means any and all forms of consent, including both implicit and explicit consent.⁶

["Computer" means a device or collection of devices, including its support devices, peripheral equipment, or facilities, and the communication systems connected to it which can perform functions including, but not limited to, substantial computation, arithmetic or logical operations, information storage or retrieval operations, capable of being used with external files, one (1) or more operations which contain computer programs, electronic instructions, allows for the input of data, and output data (such operations or communications can occur with or without intervention by a human operator during the processing of a job).]⁷

["Computer network" means a set of two (2) or more computer systems that transmit data over communication circuits connecting them, and input/output devices including, but not limited to, display terminals and printers, which may also be connected to telecommunication facilities.]]⁸

["Computer program" means an ordered set of data that are coded instructions or statements that, when executed by a computer, cause the computer to process data.]]⁹

["Computer software" means a set of computer programs, procedures, and associated documentation concerned with the operation of a computer, computer system, or computer network whether imprinted or embodied in the computer in any manner or separate from it, including the supporting materials for the software and accompanying documentation.]¹⁰

["Computer system" means a set of connected devices including a computer and other devices including, but not limited to, one (1) or more of the following: data input, output, or storage devices, data communication circuits, and operating system computer programs that make the system capable of performing data processing tasks.]¹¹

["Data" means a representation of information, knowledge, facts, concepts, or instructions which is being prepared or has been prepared in a formalized manner, and is intended to be stored or processed, or is being stored or processed, or has been stored or processed in a computer, computer system, or computer network.]¹²

["Financial instrument" includes, but is not limited to, any check, cashier's check, draft, warrant, money order, certificate of deposit, negotiable instrument, letter of credit, bill of exchange, credit card, debit card, marketable security, or any computer system representation thereof.]¹³

["Fraud" is defined as the term is used in normal conversation and includes, but is not limited to, deceit, trickery, misrepresentation and subterfuge.]¹⁴

["Input" means data, facts, concepts, or instructions in a form appropriate for delivery to, or interpretation or processing by, a computer.]¹⁵

["Output" means data, facts, concepts or instructions produced or retrieved by computers from computers or computer memory storage devices.]¹⁶

["Property" shall include:

- (A) real property;
- (B) computers and computer networks; and
- (C) financial instruments, computer data, computer programs, computer software, and all other personal property regardless of whether they are:
 - (i) tangible or intangible; (ii) in a format readable by humans or by a computer; (iii) in transit between computers or within a computer network or between any devices which comprise a computer; or (iv) located on any paper or in any device in which it is stored by a computer or by a human.]¹⁷

["Services" includes, but is not limited to, the use of a computer, a computer system, a computer network, computer software, computer program, or data to perform tasks.]¹⁸

["To process" means to use a computer to put data through a systematic sequence of operations for the purpose of producing a specified result.]¹⁹

"Knowingly" means that a person acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result.²⁰

The requirement of "knowingly" is also established if it is shown that the defendant acted intentionally.²¹

"Intentionally" means that a person acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result.²²

[The trial judge should now instruct the jury with respect to fixing value utilizing T.P.I. -- CRIM. 11.03(a), Fixing Value, using both sections (A) and (I), if applicable.]

COMMENTS

1. Accessing a computer by means of false or fraudulent pretenses, representations or promises is punished as theft under T.C.A. § 39-14-105. T.C.A. § 39-14-602(a). See the comment to T.P.I. – Crim. 11.01, Theft of property. Any person who violates this section in connection with an act of terrorism commits a Class A felony. T.C.A. § 39-14-602(d).

2. See T.P.I. – Crim. 2.06, Burden of proof: Venue (computer offenses).

¹ T.C.A. § 39-14-602(a).

² The trial judge may wish to utilize T.P.I. – Crim. 30.15, Terrorism.

³ The trial judge may wish to utilize T.P.I. – Crim. 30.15, Terrorism.

⁴ The trial judge may wish to utilize T.P.I. – Crim. 30.15, Terrorism.

⁵ T.C.A. § 39-14-601(1).

⁶ T.C.A. § 39-14-601(2).

⁷ T.C.A. § 39-14-601(3).

⁸ T.C.A. § 39-14-601(5).

⁹ T.C.A. § 39-14-601(6).

¹⁰ T.C.A. § 39-14-601(7).

¹¹ T.C.A. § 39-14-601(8).

¹² T.C.A. § 39-14-601(9).

¹³ T.C.A. § 39-14-601(11).

¹⁴ T.C.A. § 39-11-106(a)(13).

¹⁵ T.C.A. § 39-14-601(12).

¹⁶ T.C.A. § 39-14-601(15).

¹⁷ T.C.A. § 39-14-601(17).

¹⁸ T.C.A. § 39-14-601(18).

¹⁹ T.C.A. § 39-14-601(20).

²⁰ T.C.A. § 39-11-106(a)(20).

²¹ T.C.A. § 39-11-301(a)(2).

²² T.C.A. § 39-11-106(a)(18).

T.P.I. -- CRIM. 16.02

COMPUTER TAMPERING

Any person who commits computer tampering is guilty of a crime.

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:¹

[Part A:

- (1) that the defendant, without authorization, directly or indirectly, accessed any *[computer]* *[computer system]* *[computer network]*;

and

- (2) that the defendant acted intentionally.

[and

- (3) that the offense was committed in connection with an act of terrorism.]²

or

[Part B:

- (1)(a) that the defendant, without authorization, directly or indirectly, *[altered]* *[damaged]* *[destroyed]* *[attempted to damage]* *[attempted to destroy]* *[caused the disruption to the proper operation of]* any computer;

or

- (b) that the defendant, without authorization, directly or indirectly, performed any act which was responsible for the disruption of any *[computer]* *[computer system]* *[computer network]* *[computer software]* *[computer program]* *[data which resides or exists internal or external to a computer, computer system or computer network]*;

and

- (2) that the defendant acted intentionally.

[and

- (3) that the offense was committed in connection with an act of terrorism.]^{3]}

or

[Part C:

- (1) that the defendant, without authorization, directly or indirectly, introduced or was responsible for the malicious input of any computer contaminant into any *[computer] [computer system] [computer network];*

and

- (2) that the defendant acted intentionally.

[and

- (3) that the offense was committed in connection with an act of terrorism.]^{4]}

or

[Part D:

- (1) that the defendant, without authorization, directly or indirectly *[accessed] [caused to be accessed] [attempted to access] any computer software, computer network, or any part thereof;*

and

- (2) that this act was committed *[for the purpose of maliciously gaining access to computer material] [to tamper maliciously with computer security devices including, but not limited to, system hackers];*

and

(3) that the defendant acted intentionally.

[and

(4) that the offense was committed in connection with an act of terrorism.]^{5]}

or

[PART E:

(1) that the defendant, without authorization, directly or indirectly *[made]*
[caused to be made] an unauthorized copy, in any form, including, but not
limited to any *[printed]* *[electronic form of]* computer *[data]* *[programs]*
[software] *[residing in]* *[communicated by]* *[produced by]* a computer or
computer network;

and

(2) that the defendant acted intentionally.

[and

(3) that the offense was committed in connection with an act of terrorism.]^{6]}

["Access" means to approach, instruct, communicate, or connect with, store data
in, retrieve or intercept data from, or otherwise make use of any resources of a
computer, computer system, or computer network, or information exchanged from any
communication between computers or authorized computer users and electronic,
electromagnetic, electrochemical, acoustic, mechanical, or other means.]^{7]}

"Authorization" means any and all forms of consent, including both implicit and
explicit consent.^{8]}

"Computer" means a device or collection of devices, including its support
devices, peripheral equipment, or facilities, and the communication systems connected

to it which can perform functions including, but not limited to, substantial computation, arithmetic or logical operations, information storage or retrieval operations, capable of being used with external files, one (1) or more operations which contain computer programs, electronic instructions, allows for the input of data, and output data (such operations or communications can occur with or without intervention by a human operator during the processing of a job).⁹

["Computer contaminants" means any set of computer instructions that are designed to modify or in any way alter, damage, destroy, or disrupt the proper operation of a computer system, or computer network without the intent or authorization of the owner of the information. They include, but are not limited to, a group of computer instructions commonly called viruses or worms, which are self-replicating or self-propagating and are designed to contaminate other computer programs or computer data, consume computer resources, modify, destroy, record or transmit data, or in some other fashion usurp the normal operation of the computer, computer system, or computer network. Some contaminants may include:

(A) "Virus," meaning a migrating program which, at least, attaches itself to the operating system of any computer it enters and can infect any other computer that has access to an "infected" computer;

(B) "Worm," meaning a computer program or virus that spreads and multiplies, eventually causing a computer to "crash" or cease functioning, but does not attach itself to the operating system of the computer it "infects".]¹⁰

["Computer network" means a set of two (2) or more computer systems that transmit data over communication circuits connecting them, and input/output devices

including, but not limited to, display terminals and printers, which may also be connected to telecommunication facilities.]]¹¹

"Computer program" means an ordered set of data that are coded instructions or statements that, when executed by a computer, cause the computer to process data.¹²

["Computer software" means a set of computer programs, procedures, and associated documentation concerned with the operation of a computer, computer system, or computer network whether imprinted or embodied in the computer in any manner or separate from it, including the supporting materials for the software and accompanying documentation.]]¹³

["Computer system" means a set of connected devices including a computer and other devices including, but not limited to, one (1) or more of the following: data input, output, or storage devices, data communication circuits, and operating system computer programs that make the system capable of performing data processing tasks.]]¹⁴

["Data" means a representation of information, knowledge, facts, concepts, or instructions which is being prepared or has been prepared in a formalized manner, and is intended to be stored or processed, or is being stored or processed, or has been stored or processed in a computer, computer system, or computer network.]]¹⁵

"Input" means data, facts, concepts, or instructions in a form appropriate for delivery to, or interpretation or processing by, a computer.¹⁶

["Malicious" means without just cause or excuse.]]¹⁷

"Output" means data, facts, concepts or instructions produced or retrieved by computers from computers or computer memory storage devices.¹⁸

["Owner" means an owner or lessee of a computer or a computer network, or an owner, lessee or licensee of computer data, computer programs, or computer software.]¹⁹

["System hacker" means any person who knowingly accesses and without authorization alters, damages, deletes, destroys, or otherwise uses any data, computer, computer system, or computer network.]²⁰

"To process" means to use a computer to put data through a systematic sequence of operations for the purpose of producing a specified result.²¹

["Knowingly" means that a person acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result.]²²

[The requirement of "knowingly" is also established if it is shown that the defendant acted intentionally.]²³

"Intentionally" means that a person acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result.²⁴

[For Parts B and E, the trial judge should now instruct the jury with respect to fixing value utilizing T.P.I. -- CRIM. 11.03(a), Fixing Value, using both sections (A) and (I), if applicable.]

[It is a defense to prosecution for the offense in Part A of this instruction that a computer network was operated in such a way as to allow anonymous access to that network.]²⁵

COMMENTS

1. A violation of Part A is a Class C misdemeanor. T.C.A. § 39-14-602(b)(1). A violation of Part B is punished as theft under T.C.A. § 39-14-105. T.C.A. § 39-14-602(b)(2). See the comment to T.P.I. – Crim. 11.01, Theft of property. A violation of Part C is a Class B misdemeanor. T.C.A. § 39-14-602(b)(3). A violation of Part D is a Class A misdemeanor. T.C.A. § 39-14-602(b)(4). A violation of Part E is punished as theft under T.C.A. § 39-14-105. T.C.A. § 39-14-602(b)(5). Any person who violates this section in connection with an act of terrorism commits a Class A felony. T.C.A. § 39-14-602(d).
2. See T.P.I. – Crim. 2.06, Burden of proof: Venue (computer offenses).

¹ T.C.A. § 39-14-602(b).

² The trial judge may wish to utilize T.P.I. – Crim. 30.15, Terrorism.

³ The trial judge may wish to utilize T.P.I. – Crim. 30.15, Terrorism.

⁴ The trial judge may wish to utilize T.P.I. – Crim. 30.15, Terrorism.

⁵ The trial judge may wish to utilize T.P.I. – Crim. 30.15, Terrorism.

⁶ The trial judge may wish to utilize T.P.I. – Crim. 30.15, Terrorism.

⁷ T.C.A. § 39-14-601(1).

⁸ T.C.A. § 39-14-601(2).

⁹ T.C.A. § 39-14-601(3).

¹⁰ T.C.A. § 39-14-601(4).

¹¹ T.C.A. § 39-14-601(5).

¹² T.C.A. § 39-14-601(6).

¹³ T.C.A. § 39-14-601(7).

¹⁴ T.C.A. § 39-14-601(8).

¹⁵ T.C.A. § 39-14-601(9).

¹⁶ T.C.A. § 39-14-601(12).

¹⁷ Black's Law Dictionary (7th Ed.).

¹⁸ T.C.A. § 39-14-601(15).

¹⁹ T.C.A. § 39-14-601(16).

²⁰ T.C.A. § 39-14-601(19).

²¹ T.C.A. § 39-14-601(20).

²² T.C.A. § 39-11-106(a)(20).

²³ T.C.A. § 39-11-301(a)(2).

²⁴ T.C.A. § 39-11-106(a)(18).

²⁵ T.C.A. § 39-14-602(b)(1).

T.P.I. -- CRIM. 16.03

**RECEIVING, CONCEALING OR USING PROCEEDS RESULTING FROM
COMPUTER [FRAUD] [TAMPERING]**

Any person who receives, conceals, uses or aids another in receiving, concealing or using proceeds resulting from computer *[fraud] [tampering]* is guilty of a crime.

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:¹

[Part A:

- (1) that the defendant *[received] [concealed] [used] [aided another in receiving] [concealing] [using]]* any proceeds resulting from computer *[fraud²] [tampering³]*;

and

- (2) that the defendant acted knowingly.

[and

- (3) that the offense was committed in connection with an act of terrorism.]^{4]}

or

[Part B:

- (1) that the defendant *[received] [concealed] [used] [aided another in receiving] [concealing] [using]]* any *[books] [records] [documents] [property] [financial instrument] [computer software] [computer program] [other material, property or objects]* obtained as the result of computer *[fraud⁵] [tampering⁶]*;

and

- (2) that the defendant acted knowingly.

[and

(3) that the offense was committed in connection with an act of terrorism.]]^{7]}

"Computer" means a device or collection of devices, including its support devices, peripheral equipment, or facilities, and the communication systems connected to it which can perform functions including, but not limited to, substantial computation, arithmetic or logical operations, information storage or retrieval operations, capable of being used with external files, one (1) or more operations which contain computer programs, electronic instructions, allows for the input of data, and output data (such operations or communications can occur with or without intervention by a human operator during the processing of a job).⁸

["Computer network" means a set of two (2) or more computer systems that transmit data over communication circuits connecting them, and input/output devices including, but not limited to, display terminals and printers, which may also be connected to telecommunication facilities.]]⁹

"Computer program" means an ordered set of data that are coded instructions or statements that, when executed by a computer, cause the computer to process data.¹⁰

["Computer software" means a set of computer programs, procedures, and associated documentation concerned with the operation of a computer, computer system, or computer network whether imprinted or embodied in the computer in any manner or separate from it, including the supporting materials for the software and accompanying documentation.]]¹¹

["Computer system" means a set of connected devices including a computer and other devices including, but not limited to, one (1) or more of the following: data input,

output, or storage devices, data communication circuits, and operating system computer programs that make the system capable of performing data processing tasks.]]¹²

["Data" means a representation of information, knowledge, facts, concepts, or instructions which is being prepared or has been prepared in a formalized manner, and is intended to be stored or processed, or is being stored or processed, or has been stored or processed in a computer, computer system, or computer network.]]¹³

["Financial instrument" includes, but is not limited to, any check, cashier's check, draft, warrant, money order, certificate of deposit, negotiable instrument, letter of credit, bill of exchange, credit card, debit card, marketable security, or any computer system representation thereof.]]¹⁴

"Input" means data, facts, concepts, or instructions in a form appropriate for delivery to, or interpretation or processing by, a computer.¹⁵

"Output" means data, facts, concepts or instructions produced or retrieved by computers from computers or computer memory storage devices.¹⁶

["Property" shall include:

- (A) real property;
- (B) computers and computer networks; and
- (C) financial instruments, computer data, computer programs, computer software, and all other personal property regardless of whether they are:
 - (i) tangible or intangible; (ii) in a format readable by humans or by a computer; (iii) in transit between computers or within a computer network or between any devices which comprise a computer; or (iv) located on any

paper or in any device in which it is stored by a computer or by a human.]¹⁷

"To process" means to use a computer to put data through a systematic sequence of operations for the purpose of producing a specified result.¹⁸

"Knowingly" means that a person acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result.¹⁹

The requirement of "knowingly" is also established if it is shown that the defendant acted intentionally.²⁰

"Intentionally" means that a person acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result.²¹

[The trial judge should now instruct the jury with respect to fixing value utilizing T.P.I. -- CRIM. 11.03(a), Fixing Value, using both sections (A) and (I), if applicable.]

COMMENTS

1. Receiving, concealing, using or aiding another in receiving, concealing or using proceeds from computer fraud or tampering is punished as theft under T.C.A. § 39-14-105. T.C.A. § 39-14-602(c). See the comment to T.P.I. – Crim. 11.01, Theft of property. Any person who violates this section in connection with an act of terrorism commits a Class A felony. T.C.A. § 39-14-602(d).
2. See T.P.I. – Crim. 2.06, Burden of proof: Venue (computer offenses).

¹ T.C.A. § 39-14-602(c).

² The trial judge will need to instruct the jury as to Part A, Part B or Part C, whichever is applicable, of T.P.I. – Crim. 16.01, Computer fraud.

³ The trial judge will need to instruct the jury as to Part B only of T.P.I. – Crim. 16.02, Computer tampering.

⁴ The trial judge may wish to utilize T.P.I. – Crim. 30.15, Terrorism.

⁵ The trial judge will need to instruct the jury as to Part A, Part B or Part C, whichever is applicable, of T.P.I. – Crim. 16.01, Computer fraud.

⁶ The trial judge will need to instruct the jury as to Part B only of T.P.I. – Crim. 16.02, Computer tampering.

⁷ The trial judge may wish to utilize T.P.I. – Crim. 30.15, Terrorism.

⁸ T.C.A. § 39-14-601(3).

⁹ T.C.A. § 39-14-601(5).

¹⁰ T.C.A. § 39-14-601(6).

¹¹ T.C.A. § 39-14-601(7).

¹² T.C.A. § 39-14-601(8).

¹³ T.C.A. § 39-14-601(9).

¹⁴ T.C.A. § 39-14-601(11).

¹⁵ T.C.A. § 39-14-601(12).

¹⁶ T.C.A. § 39-14-601(15).

¹⁷ T.C.A. § 39-14-601(17).

¹⁸ T.C.A. § 39-14-601(20).

¹⁹ T.C.A. § 39-11-106(a)(20).

²⁰ T.C.A. § 39-11-301(a)(2).

²¹ T.C.A. § 39-11-106(a)(18).

T.P.I. – CRIM. 31.21

**CONTROLLED SUBSTANCE ANALOGUES: UNLAWFUL
REPRESENTATION, ADVERTISEMENT OR INFERENCE**

Any person who commits the offense of unlawful *[representation]*
[advertisement] *[inference]* of a controlled substance analogue is guilty of a
crime.

For you to find the defendant guilty of this offense, the state must have
proven beyond a reasonable doubt the existence of the following essential
elements:¹

- (1) that the defendant *[represented, orally or in writing,]* *[advertised]*
[inferred] that a substance *[was a derivative of, or substantially*
similar to, the chemical structure of a controlled substance] *[had a*
stimulant, depressant, or hallucinogenic effect on the central
nervous system substantially similar to or greater than the
stimulant, depressant, or hallucinogenic effect on the central
nervous system of a controlled substance] *[was (insert here a*
substance listed in § 39-17-452)];

and

- (2) that the substance was a controlled substance analogue;

and

- (3) that the defendant acted intentionally, knowingly or recklessly.²

[_____] is a controlled substance analogue.³

[_____] is a controlled substance.⁴

"Recklessly" means that a person acts recklessly with respect to circumstances surrounding the conduct or the result of the conduct when the person is aware of, but consciously disregards, a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused person's standpoint.⁵

"Knowingly" means that a person acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result.⁶

"Intentionally" means that a person acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result.⁷

[It is not a defense that the controlled substance analogue (A) is not a derivative of a controlled substance, (B) does not have a chemical structure that is substantially similar to that of a controlled substance, (C) does not have a stimulant, depressant, hallucinogenic effect on the central nervous system substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance, or (D) is not listed in § 39-17-452.]⁸

COMMENTS

1. A violation of this offense is a Class A misdemeanor. T.C.A. § 39-17-454(g)(4). However, the building and premises of any business in or upon which a violation is committed by an employee, agent or owner of such business is declared to be a public nuisance and shall be subject to abatement as provided in title 29, chapter 3. T.C.A. § 39-17-454(j).

¹ T.C.A. § 39-17-454(f)(1).

² T.C.A. § 39-11-301(b) and T.C.A. § 39-11-301(c) and accompanying Sentencing Commission Comment.

³ The trial judge should include this bracketed language if the controlled substance analogue is one listed in T.C.A. § 39-17-452 as an analogue. If it is not listed, it will be a jury question, and the trial judge should utilize 31.20, Controlled Substance Analogue.

⁴ "Controlled substance" means a drug, substance or immediate precursor in Schedules I through VII of §§ 39-17-403 – 39-17-416. T.C.A. § 39-17-402(4).

⁵ T.C.A. § 39-11-106(a)(31).

⁶ T.C.A. § 39-11-106(a)(20).

⁷ T.C.A. § 39-11-106(a)(18).

⁸ T.C.A. § 39-17-454(f)(2).